

# FOLEY'S | LIST



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## CHAIR

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# THE RISE OF ASIAN LITIGANTS IN COMMERCIAL DISPUTES <sup>1</sup>

*Cam Truong and William Lye OAM \**

## **Introduction**

1. Cultural diversity is at the centre of Australia's identity. The face of Australia has changed dramatically in recent decades and Asia is now an important part of our identity.<sup>2</sup>
2. The same could be said about litigants in our courtroom.
3. As we progress further in this Asian century, anecdotally at least,<sup>3</sup> there are increasing numbers of Asian litigants<sup>4</sup> involved in commercial disputes in Victoria. This presents both challenges and opportunities for legal practitioners and Courts alike.
4. This paper discusses some of the reasons why there are increasing numbers of Asian litigants, trends in such litigation including case examples and some cultural issues which practitioners and Courts ought to consider.
5. This paper encourages litigators and Courts to better understand these reasons, trends and cultural issues to better service Asian litigants in future commercial disputes having regard to the objects and paramount obligations under the *Civil Procedure Act 2010* (Vic).

## **Why the rise in Asian litigants?**

6. There are a few reasons why there are increasing Asian litigants in our commercial courts.

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\* Both William Lye OAM and Cam Truong are members of Foley's List and experienced commercial barristers who each regularly act in commercial disputes involving Asian litigants.

<sup>1</sup> This paper has been prepared as part of the Foley's List Commercial Disputes Seminar Series presented on 15 March 2017.

<sup>2</sup> Australia in the Asian Century Implementation Task Force, *Australia in the Asian Century*, White Paper, (2012) 77 ('*Australian in the Asian Century White Paper*').

<sup>3</sup> This is the experience of the authors and from practitioners and Judges that the authors have spoken to. No known study or statistics have considered this issue.

<sup>4</sup> In this paper, a reference to 'Asian litigants' refers to a litigant of Asian ancestry, whether born in an Asian country or born in Australia.

7. First, recent data from the Australian Bureau of Statistics <sup>5</sup> show that 28% of the Australian population was born overseas and that five of the top 10 countries of birth were from Asian countries (China 2.0%, India 1.8%, Philippines 1.0%, Vietnam 1.0% and Malaysia 0.7%). These statistics show that the proportion of Australians born with heritage from these countries has significantly increased over the last decade.
8. There is an increasing trend of more people from Asian countries living, studying, working and permanently relocating to Australia. As the Commonwealth Government's White Paper (2012) notes:

*More people from Asian countries live, study and work in Australia than ever before. Of the 5 million overseas-born people living in Australia, almost 2 million were born in Asia – an increase from 276,000 in 1981. Close to 1 in 10 of Australia's population identifies with Asian ancestry. Today, there are more speakers of Chinese languages in Australia than speakers of Italian or Greek. In 2010-11, for the first time in Australian history, Britain was not the main source of permanent residents – more people moved here from China than from any other country, and in 2011-12, India was the number one source of permanent migrants. ...*

*Asia has become an important part of our Australian identity.*

*Australia's people-to-people links with Asia grew stronger throughout the 1970s and these connections deepened into the 21<sup>st</sup> century.*

*Many Indian professionals, such as doctors, teachers and engineers, came to Australia in the late 1960s and 1970s. Further growth in migration from the region occurred in the late 1970s, when Indochinese refugees and their families came to Australia following the Vietnam War. Between 1975 and 1989, around 120,000 were resettled here (Quilty & Goldsworthy 2003). Vietnam remained the main source of migrants from the region through to the early 1990s. The period from the mid-1980s to the mid-1990s brought an increase in migrants from elsewhere in Asia, such as the Philippines, Malaysia and Hong Kong.*

*In 1984, for the first time, Asia-born permanent arrivals to Australia outnumbered permanent arrivals born in Europe (ABS 2012a).*

*In the past 15 years, permanent migration from throughout Asia to Australia has grown more than four-fold from around 25,000 in 1997-98 to about 112,000 in 2010/11. India and China have driven this growth in the skilled and migration streams; the Philippines, Sri Lanka, Vietnam, Malaysia and South Korea are also important sources of permanent migrants from these streams. In this time, Australia has resettled around 32,000 refugees and people in humanitarian need from the Asian region, mainly from Myanmar and Sri Lanka.*

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<sup>5</sup> Australian Bureau of Statistics, *Migration, Australia 2014-15* (30 March 2016) Australian Bureau of Statistics <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3412.0/>>.

...

*There has been a large increase in the number of people from Asia who spend time here studying or working temporarily. Around 40 per cent of long-term temporary skilled migrants to Australia are from countries in Asia – the number more than doubled from 20,000 in 2001 to 48,000 in 2011. Many are from China, the Philippines and India ... Some temporary migrants become permanent residents in Australia; others return home or move to another country to pursue new opportunities.<sup>6</sup>*

9. A greater proportion of the local population are therefore Asian. This is reflected in increasing numbers of Asian litigants in commercial disputes.
10. Secondly, and relatedly, as one of the trends below demonstrate the accumulation of wealth by first-generation Asian Australians has resulted in more commercial disputes between family members, often between the children. These are often bitter disputes between siblings over family wealth and property inheritance.
11. Thirdly, and more generally, there is no doubting that Asian foreign investment in Australia has increased.
12. At the end of 2015, the leading countries that invested in Australia included Japan (\$199.6 billion), Singapore (\$98.6 billion), China (including Hong Kong) (\$160.3 billion).<sup>7</sup> A key area of investment is property investment. Asian capital has displaced capital from the USA and Europe as the number one source of property investment and Chinese capital, in particular, has increased from \$50 million in the period 2001 to 2008 to \$16 billion in the period 2009 to 2016.<sup>8</sup>
13. The increase in Asian investments and capital inflows into Australia is reflected in the increase in Asian litigants in commercial disputes.

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<sup>6</sup> *Australian in the Asian Century White Paper*, above n 2, 98-100.

<sup>7</sup> Department of Foreign Affairs and Trade, *Australia and Foreign Investment* (October 2016) Department of Foreign Affairs and Trade < <http://dfat.gov.au/trade/topics/investment/Pages/which-countries-invest-in-australia.aspx>>.

<sup>8</sup> Colliers International, 'New Pathways for Asian Investment' (2016) *Asian Investment Paper* 1, 2.

## Trends in Asian commercial litigation

14. There are at least two trends in commercial disputes involving Asian litigants in Victoria:
  - (a) Disputes between family members over trust assets;
  - (b) Disputes involving businesses designed to achieve a migration visa.
  
15. In this section of the paper, we will explore and consider examples of each of these categories of disputes.

### *Dispute between family members and trust assets*

16. These are often unfortunate cases in which substantial family assets are the subject of bitter disputes between family members.
  
17. In *Nguyen v Phan (No 2)*,<sup>9</sup> the Supreme Court was asked to determine a dispute over assets of a Vietnamese family and their companies involved in a successful sheet metal business. As the Court observed at the outset:

*This is an unfortunate case. It involves a family who travelled to Australia from Vietnam in a situation of adversity. A number of the family members worked together to establish themselves in Australia, but, having succeeded in business, now find themselves in a bitter dispute.*<sup>10</sup>

18. The Court set out in some detail the family history in Vietnam and Australia. The other difficult aspect of the case was the dearth of probative contemporaneous documents as well as the self-righteous nature of the principal oral evidence. As Elliott J observed:

*It is an unfortunate case for a further reason. None of the parties maintained satisfactory records concerning agreements or arrangements entered into. To the extent that documentation was created at the relevant times, in some instances all parties contend for cases that, in significant respects, bear no resemblance to key documents. As a result, the court has been left with oral accounts of events that occurred many years ago with, on some occasions, little reliable contemporaneous documentation. Consequently, there is inherent uncertainty attaching to significant aspects of the competing cases.*<sup>11</sup>

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<sup>9</sup> [2015] VSC 634.

<sup>10</sup> Ibid 1.

<sup>11</sup> Ibid 8.

*These difficulties were compounded by the manner in which some of the evidence was given at trial. The principal witnesses in this case were Thomas and his older sister, the second plaintiff and second defendant by counterclaim, Thuy Phan (“Thuy”). Neither of them was a satisfactory witness. Both of them were willing to give evidence based on a reconstruction that suited their case. Further, the credibility of both of them suffered from their constant insistence (despite direction to the contrary) on not giving direct answers to questions put to them, and frequently and non-responsively telling their version of the case.*<sup>12</sup>

19. The dispute was long and complex involving alleged breaches of trust and breaches of fiduciary duties as directors of the family companies. In a lengthy judgment, the Court found that both the plaintiffs and defendants were largely unsuccessful on their pleaded cases. Accordingly, with minor exceptions, the Court made no orders as to costs.<sup>13</sup>
20. In *Lam v Lam*,<sup>14</sup> the Supreme Court was again asked to determine a dispute involving a Vietnamese family. In that proceeding, claims brought by one sibling against two others for alleged wrongful and fraudulent transfers of land.
21. Detailed evidence was led about the various contributions to the property purchases and to the conduct of various family members.
22. The defendant siblings denied any wrongdoing and claimed that their sibling plaintiff held land on a resulting or express trust. The Court found that the plaintiff’s claims of fraud were not established.
23. Most recently, in *Ying Mui Pty Ltd v Hoh (No 3)*,<sup>15</sup> the Supreme Court was asked to determine a dispute involving members of a Chinese-Malaysian family and trust assets held in Australia. The Court observed the tragic nature of the dispute given the last wishes of the disputing siblings’ late father:

*Hoh Senior passed away on 21 April 1988. Before his death, Hoh Senior delivered instructions for his will which included the following prayer:*

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<sup>12</sup> Ibid 9.

<sup>13</sup> *Nguyen v Phan (No 3)* [2015] VSC 685 at [11] - [12] per Elliott J.

<sup>14</sup> [2016] VSC 298.

<sup>15</sup> [2017] VSC 29. Cam Truong (led by Peter Bick QC) appeared for the first to fifth defendants.

*These are my last instructions to my children, grand-children and their descendants and it is my sincere wish that they will be faithfully carried out.*

...

*It is my deepest and dearest wishes that my children and descendants will continue to love and help each other when I am gone. Take heed of the old saying “Harmony within the Family promotes prosperity”. The way to achieve such harmony as taught by ancient sages is to cultivate the virtues of filial piety and brotherly love.*

*It is tragic for the Hoh family that these wishes of Hoh Senior have no to date been fulfilled, culminating in the present litigation of Wagnerian proportions and cost – not only in financial terms, but also in exacerbating the strains within the family which have driven it to this point.<sup>16</sup>*

24. The Court ordered a ‘sequential trial’ model following an interlocutory ruling.<sup>17</sup> This was to enable proper case management of a large and complex set of legal and factual issues and “fifteen years of complex commercial activity” involving many actors and commercial entities.
25. In essence, the dispute involved claims between two brothers and the primary protagonists – Frank Hoh and George Hoh – and their supporters within the wider family.
26. The first tranche questions identified for determination were as follows:<sup>18</sup>
  - (1) In or about April 2001, or any other and what time, was the alleged Joint Investment Agreement (the ‘JI Agreement’) formed between George, Frank and Robert Hoh to undertake property investment in Victoria through the vehicle of Ying Mui Pty Ltd and if so:
    - (a) what were the terms of the JI Agreement?
    - (b) was property investment in Victoria subsequently undertaken by George, Frank and Robert Hoh pursuant to the JI Agreement?
  - (2) If not, in and after April 2001, was any or all property investment in Victoria undertaken by the Hoh family:
    - (a) for an on behalf of the family company, SYM: and/or

<sup>16</sup> *Ying Mui Pty Ltd v Hoh (Ruling No 1)* [2016] VSC 519, 3-4 (Vickery J).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ying Mui Pty Ltd v Hoh (No 3)* [2017] VSC 29, 10.

- (b) pursuant [to] the alleged benevolent purpose; and/or
- (c) paid for by capital advanced by SYM, and not by loan funds;
- (d) and if so, should any and what assets be held wholly or partly on a resulting and/or a constructive trust for SYM?

(3) Did Lumarkye, in receiving the Sydenham Property and Lot 202 from Ying Mui, knowingly receive trust property? If so, is Lumarkye a constructive trustee with respect to the Sydenham Property and Lot 202 or is required to pay compensation to Ying Mui?

27. His Honour found on the evidence that essentially there was no binding joint investment agreement but there existed a joint endeavour between the three Hoh brothers from 2001 which operated through discretionary trust structures in Australia. The joint endeavour was funded by bank borrowings and partly by money that originated from a family company in Malaysia but which ultimately constituted loans by the three brothers to the Australian trust entities at the time of purchase of trust assets. His Honour further found on the evidence that Lumarkye knowingly received trust property when it purchased two properties.
28. The proceeding is ongoing with further tranches of questions on liability to be determined.

*Disputes involving businesses designed to achieve a migration visa*

29. Another recent trend involving Asian litigants particularly Chinese litigants are disputes arising out of failed businesses and efforts to secure a business migration visa.
30. In the recent decision of *He v Huang*,<sup>19</sup> the County Court was asked to determine a commercial dispute between parties to a joint business endeavour which major purpose was to help secure permanent visa in Australia. The joint business endeavour involving an automotive trailer parts business was formed between a Chinese national, Mr Huang and a Chinese Australian, Mr He pursuant to which Mr He was employed as a general manager. Mr Huang was a former Red Guard during the Cultural Revolution. Mr

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<sup>19</sup> [2016] VCC 1658. Cam Truong appeared for the second defendant and plaintiff by counterclaim – Top Union. The proceeding is currently the subject of proceedings in the Court of Appeal.



Huang sought permanent residency through a “Business Owner Visa”. Mr He and Mr Huang fell into dispute several months into their business association.

31. Mr He and his company JC He International Pty Ltd brought a number of claims including conversion against Mr Huang and his company, Top Union Pty Ltd arising from stock and assets that he brought over. Top Union’s counterclaim against Mr He, JC He International and Mr He’s wife involved alleged breaches of fiduciary duty and contractual duty arising from their employment by Top Union. The basis for this claim was that Mr He and Ms Liu continued selling trailer parts for and on behalf of JC He International whilst working full-time for Top Union which continued trading was not authorised.
32. The plaintiffs’ claims concerning the stock were largely dismissed. One claim concerning conversion of assets was successful. Top Union’s counterclaim concerning breaches of fiduciary and contractual duty was successful. His Honour Judge MacNamara found:

*In circumstances where I have found that the contract between Mr He and Mr Huang did not authorise Mr He to continue to operate JC He in competition with Top Union and his employment contract with Top Union was an orthodox short form one which would carry with it the contractual obligations referred to above [implied duty of good faith and fidelity], it must follow that in continuing to operate JC He, Mr He was in breach both of his implied contractual obligations and his duty of fidelity as a fiduciary.<sup>20</sup>*

33. The Court ordered that the plaintiffs pay a high proportion of the defendants’ (including Top Union as the plaintiff by counterclaim) costs.

### **Cultural issues confronting Asian litigants**

34. A real challenge facing legal practitioners and Courts alike are cultural issues facing Asian litigants. It is true that ‘there is no such thing as a typical Asian litigant’.<sup>21</sup> However, there are common themes that confront many Asian litigants.

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<sup>20</sup> At [269]

<sup>21</sup> Andrew Godwin, ‘Asian cultural awareness in the courtroom’, 2016  
<<http://law.unimelb.edu.au/news/MLS/workshop-aims-to-bring-asian-cultural-awareness-into-the-courtroom>>.

35. This paper will explore two of these themes:
- (a) the role and importance of ‘Face’;
  - (b) the need for cultural intelligence.

*The role and importance of ‘Face’*

36. ‘Face’ and various aspects of ‘gaining face’ and not ‘losing face’ are fundamental to many Asian cultures. It is a key driver of a person’s thinking, behaviour and social networks. Its importance should not be underestimated.
37. The concept of ‘Face’ in Asian culture is difficult to translate. It cannot be described properly by reference to one concept. However, a good explanation is as follows.<sup>22</sup>

*One way to describe Face is that it is the prevention of embarrassment at all costs. But it is insufficient as Asian cultures emphasize a concern with loss of Face for the individual personally, and for others as well. ...*

*There are many aspects of Face: one can lose Face, gain Face, and lose Face for others. One can also get the most unfortunate reputation of one who does not want Face, or worse, one who has no Face.*

*Face is important in Asia in the same way that an American’s Self is important. Both Face and Self are at the core of the persons being ... Just as many Westerners get extremely concerned and threatened when their self-respect is compromised, Asian people are very concerned about losing Face, which means losing the respect of others.*

...

*It is important to remember that many Chinese see themselves as seamlessly integrated with a wide range of other people, including their schoolmates, co-workers, and extended family, as well as their social, professional, and friendship networks.*

...

*An individual’s loss of Face can unravel the complicated, carefully woven fabric of social relationships, what the Chinese call Guanxi, upon which every person’s success in society depends.*

38. ‘Face’ is critical in business dealings. A manifestation of ‘gaining face’ and trust in some Asian cultures is by not recording agreements or facts in writing. As the Honourable Justice Rares observed, speaking extra-judicially in 2015<sup>23</sup>:

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<sup>22</sup> Bill Drake, *What is ‘Face’ in Asian Culture and Why Should we Care?* International Man <<http://www.internationalman.com/articles/what-is-face-in-asian-culture-and-why-should-we-care>>.

*A good example of how cultural differences can affect the quality of decision-making process in a legal context was brought home to me at the Beijing Conference of the Comite Maritime International in 2012, by an excellent paper entitled *The Eastern and Western Cultural influences on Maritime Arbitration and its Recent Development in Asia* presented by Philip Yang. He was a native Hong Kong resident, Oxford educated British citizen, barrister, vice-chairman of the Documentary Committee of the Baltic and International Maritime Council (BIMCO) and chairman of the Hong Kong International Arbitration Centre. He was also a maritime arbitrator.*

*Mr Yang opined that cultural differences remained the most important problem in international arbitration. He explained that many Asian cultures did not favour recording facts in writing, in contrast to the way in which business is conducted in Western societies. He gave as an example a London arbitration in which he sat with two retired English judges, in a reference involving a European ship owner and a Chinese shipyard. The three arbitrators had to decide whether a pro-forma contract for the building of six new bulk carriers signed on behalf of the Chinese shipyard by its senior delegate at the end of a visit to Europe was a legally binding contract.*

...

*During cross-examination the Chinese signatory said: "I have to sign something in order to justify the delegation's expensive trip to Europe to my superior and the State authorities". The witness added that both parties had agreed at the meeting that the signing of the pro forma contract would not signify a final agreement because the Chinese delegates still had to negotiate on a number of outstanding issues and to obtain approval for the deal from their superior.*

*The answer struck the other two arbitrators as unacceptable, but Mr Yang considered that the witness' account was corroborated by the subsequent correspondence between the parties dealing with those outstanding issues. The European party should to explain that correspondence away by asserting that it was an attempt to renegotiate the signed pro-forma contract. The arbitral panel's chairman drafted an award finding against the Chinese party. However, after deliberations, drawing on Mr Yang's insights, the three arbitrators came to an unanimous award in favour of the Chinese party.*

*The importance of the illustration was that, through his Chinese cultural background, Mr Yang understood right away, before the later evidence was tendered, that the Asian away of doing business was very different to the European.<sup>24</sup>*

39. Considerations of 'face' and 'loss of face' experienced by Asian litigants is often a driver in pursuing and defending litigation.

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<sup>23</sup> Steven Rares, 'Open and Accessible Courts: Community Engagement, Public Education and Awareness' (Speech delivered at the AIJA Cultural Diversity and the Law conference, Sydney, 13 March 2015).

<sup>24</sup> Ibid 3-4.

40. It can also provide a real obstacle in attempts to settle commercial litigation because Asian litigants could value ‘face’ considerations as equal to, or higher than, purely commercial considerations and costs considerations.
41. The very act of mediating could also be construed as a ‘loss of face’. As the editors of ‘An Asian Perspective on Mediation’<sup>25</sup> explain:

*There be some reluctance on the part of Asian parties to initiate mediation as this can be construed as a sign of weakness, and consequently a loss of face. Mediation centres or providers should be sensitive to this. When approached by one party, mediation centres and providers should, as a matter of course, offer to approach the other party or parties and persuade them to mediate. By assuming the role of case-persuaders, they will be addressing the parties’ face concerns from the beginning.*<sup>26</sup>

42. The Asian concept of ‘Face’ has sometimes been referred to and relied on in commercial litigation usually as contextual evidence or evidence relevant to loss and damage.
43. In *Melbourne Chinese Press Pty Ltd v Australian Chinese Newspapers Pty Ltd*<sup>27</sup>, the Federal Court was asked to stay orders pending the hearing and determination of an application for leave to appeal. The primary proceedings involved proceedings for an alleged trademark infringement in which the primary judge concluded that the offending masthead was deceptively similar relying on expert evidence concerning how particular Chinese characters would be understood by the average reader.
44. The applicant seeking stay orders relied on evidence concerning the cost, inconvenience and ‘loss of face’ associated with having to abandon the masthead and reverting to another version. The Court dismissed the stay application.
45. In *Peter Tao Zhu v Sydney Organising Committee for the Olympic Games & Ors*,<sup>28</sup> Bergin J was asked to consider claims arising out of a dispute between Mr Zhu (born in China but granted Australian citizenship in 1997) and TOC Management Services Pty

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<sup>25</sup> Joel Lee and Teh Hwee Hwee (eds), *An Asian Perspective On Mediation*, (Academy Publishing, 2009).

<sup>26</sup> Ibid 73.

<sup>27</sup> [2003] FCA 997.

<sup>28</sup> [2001] NSWSC 989.

Ltd (TOC) and the Sydney Organising Committee for the Olympic Games (SOCOG) in relation to an Agency Agreement between Mr Zhu and TOC. Under that agreement, Mr Zhu was authorised to sell memberships of the Olympic Club to Mainland Chinese.

46. The primary claims against SOCOG were that it interfered with contractual relations between Mr Zhu and which resulted in a wrongful repudiation and damages. Evidence of loss of face in connection with a loss of opportunity claim was led during the trial. Bergin J observed:

*SOCOG's evidence demonstrates the importance of having "face" to do business in China ... Once the plaintiff could no longer proceed with his Agency he had to inform those with whom he had dealt in China that he could not continue with the proposed arrangements. This alone caused a loss of "face" which was compounded by the press reports, which I am satisfied would have identified the plaintiff in the minds of those who read the reports with whom the plaintiff had dealt. I am satisfied that such loss of "face" would have impacted adversely on the plaintiff's capacity to do business in China in particular to market the packages that were the subject of the press reports.*<sup>29</sup>

47. The Court found that Mr Zhu had established his claim of contractual interference against SOCOG in awarding damages of \$3,555,006 including \$3 million for loss of opportunity.
48. A loss of face has also been relied on as a basis for damages in defamation and malicious prosecution cases.
49. In *The Korean Times Pty Ltd v Un Dok Pak*,<sup>30</sup> the New South Wales Court of Appeal was asked to consider whether damages awarded in a defamation claim was excessive. One of the components of aggravated damages was 'saving face' in Korean culture. The Court of Appeal observed:

*Relevantly, the trial judge's reasons for awarded aggravated damages were as follows:*

*"166 An award of aggravated damages is appropriate having regard to the above but also having regard to the defendants' behaviour and attitude, the finding I have made about malice and noting that the defendants still refuse to apologise to the plaintiff. As well, it is clear from the evidence of the*

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<sup>29</sup> Ibid 401.

<sup>30</sup> [2011] NSWCA 365.

*witnesses that “face” or “saving face” is an important aspect of Korean culture”.*<sup>31</sup>

50. The Court of Appeal held that the trial judge erred in having regard to the defendant’s behaviour, attitude and malice as there was no evidence that these states of mind affected the harm sustained by the plaintiff. However, the Court of Appeal, in reassessing damages at \$80,000 found that a refusal to apologise in the circumstances was a relevant factor and implicitly the concept of ‘saving face’ was relevant. The Court of Appeal observed that:

*At the time of publication the respondent had a sound reputation for honesty and integrity, and was of high standing in the Korean community. She held senior positions in numerous public bodies which served the community, to which reference has earlier been made. For some years she had been in practice as a solicitor in partnership with her husband in Strathfield. Her clientele is mainly Korean.*

*The imputations were grave allegations that she was suspected by ICAC for improper conduct for political donations to a member of parliament which warranted investigation by it. They were published to about 12,000 readers in the Korean community. Witnesses testified to the injury caused to her reputation as a result. Unsurprisingly, her evidence was that she felt very upset, disgusted, sick, and shocked by the publication.*<sup>32</sup>

51. In *Zhang v State of New South Wales; Liao v State of New South Wales*,<sup>33</sup> both the plaintiffs relied on ‘loss of face in China’ as one of the particulars of damages. The Court dismissed applications by the defendant that the proceedings be dismissed on the basis that they were time barred.

#### *The need for cultural intelligence*

52. It is often assumed that if a legal practitioner speaks the client’s language then there would be better outcomes. The challenge, however, of mutual understanding is vast because language is only one form of communication. The awareness of another person’s cultural sensitivities, gestures and philosophy, and the ability to interpret them

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<sup>31</sup> Ibid 118.

<sup>32</sup> Ibid 139-140.

<sup>33</sup> [2012] NSWSC 606.

appropriately with a considered response is also important for strategic representation of Asian litigants.<sup>34</sup>

53. Western values and culture obviously differ markedly from the Asian culture. It is often the case in commercial negotiations that Western negotiators see Chinese negotiators as inefficient, indirect and even dishonest, while the Chinese see Western negotiators as aggressive, impersonal and excitable.<sup>35</sup>
54. The differences in behavioural styles make it difficult to navigate cultural differences, and explain to the Court its significance or consequence to a party's case.
55. In *Li Zhao v Argo Pty Ltd*<sup>36</sup> the appellant appealed against a dismissal of its application for summary judgment against the respondent in an action under the *Instruments Act 1958* (Vic) in relation to the appellant's cheque handed over to the respondent's agent without the appellant knowledge or consent.
56. The circumstances in which the cheque were drawn and used were unusual but it involved the appellant's only son (Mainland Chinese born) trying to help his friend (Mainland Chinese born) purchase a property from the respondent (Indonesian Chinese controlled) during a property inspection when his friend did not have his own cheque book with him. The appellant's son had a blank pre-signed counter-cheque of the appellant and handed it over to his friend with the condition that the cheque not be banked by the Vendor's agent but to be substituted by his friend.
57. The transaction was clearly entered into in the "Chinese way" and as between the parties. From a legal point of view, the appellant's son engaged in a fraud when he provided the cheque in the circumstances described even though the parties did not intend to cash the cheque. However, given the relationship between the parties and the manner in which Chinese friends help each other, it is difficult to reconcile within a legal framework. Elliott J observed:

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<sup>34</sup> Lye, W (2010), *Engaging the Dragon: the Need for Cultural Intelligence*, paper presented at the Australian Institute of International Affairs, 12 May.

<sup>35</sup> Graham, JL, and Lam, NM, 2003, *The Chinese Negotiation*, Harvard Business Review, October, pp. 82-91

<sup>36</sup> [2014] VSC 24.

*... the Cheque was drawn was clearly used for purposes beyond those referred to by Zhao. The bank records tendered demonstrate that very large amounts have been withdrawn from this account, 1 such withdrawal being \$450,000. Such transactions show that it is likely that the account was used for purposes other than “substantial expenses” in relation to the investment properties. While this fact may not be inconsistent with the evidence given by Zhao (about which I say nothing further), it does suggest that inquiries need to be made in relation to how other cheques signed by Yu in relation to that account have been utilised.*

*In short, the relationship between Wei and Xia on the one hand, with Yu and Zhao, both collectively and individually, on the other hand goes well beyond what was previously disclosed to the court.<sup>37</sup>*

58. While the ultimate resolution of the case would turn on technical legal arguments, the parties were better off having the matter mediated where the non-legal issues involving cultural issues were given greater prominence, which ultimately resolved the proceedings between all the parties.
59. Knowing culture and its values is therefore vital in being able to effectively resolve commercial disputes involving Asian litigants.

### **What this means for legal practitioners and Courts**

60. The rise of Asian litigants in commercial disputes presents opportunities and challenges for litigators and Courts alike.
61. For Courts, a number of considerations immediately come to mind.
62. First, a lack of English and knowledge of Court process by many Asian litigants may require greater and earlier intervention by commercial courts and judges so that early mediation or other alternative forms of dispute resolution can be explored and Court processes properly explained before substantial costs are incurred. This is entirely consistent with the overarching obligations and principles under the *Civil Procedure Act 2010 (Vic)*.

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<sup>37</sup> Ibid, para [40], [41].



63. Further, early mediation ordered by courts could be a good ‘face saving’ exercise for all parties concerned rather than one requested by one of the parties.
64. In this regard, there could be a role for specialist mediators or mediators with cultural training to assist in resolving disputes.
65. Secondly, it is important for Courts to understand and take into account cultural issues such as ‘face’ and ‘cultural intelligence’ when considering commercial disputes and assessing the demeanour of Asian witnesses. In this regard, the cultural training that Victorian judges undertake from time to time is important and welcomed.<sup>38</sup>
66. Thirdly, and more positively, the rise in commercial disputes involving Asian litigants means that our courts are becoming more experienced in dealing with the cultural issues posed by them. Over time, courts will be a more effective and trusted avenue by which disputes among Asian litigants can be resolved quickly and expeditiously. As noted in the White Paper:

*The Asian century is an Australian opportunity. As the global centre of gravity shifts to our region, the tyranny of distance is being replaced by the prospects of proximity. Australia is located in the right place at the right time – in the Asian region in the Asian century*<sup>39</sup>

67. For litigators, the rise of Asian litigants presents both opportunities than challenges.
68. They are undoubtedly an increasing source of new clients. However, litigators have a special responsibility to ensure that their clients are properly informed and advised about the Court process, the limits to which judicial resolution of disputes will finalise resolve a ‘dispute’ with another party and to manage cultural issues such as ‘face’ when undertaking mediation and in pursuing Court proceedings.
69. With Asian litigants, nothing is impossible but everything is difficult. Practitioners will have to plough through the challenges step by step, and nurture the relationship slowly.

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<sup>38</sup> See, for example, inaugural workshop delivered by the Judicial College of Victoria to judges in February 2016 facilitated by Associate Director of the Asian Law Centre Andrew Godwin. Cam Truong was a panel member during one of these sessions.

<sup>39</sup> *Australian in the Asian Century White Paper*, above n 2, 1.